Filed 8/25/04 P. v. Simmons CA6

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**

**California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.**

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

| | |
|---|---|
| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>MARK STEVEN SIMMONS,<br><br>Defendant and Appellant. | H026672<br>(Santa Clara County<br>Super.Ct.No. E9909752) |

Mentally disordered offenders (MDO) may be subjected to continued treatment by the State Department of Mental Health beyond the time they would otherwise be released from incarceration for their underlying crimes. Treatment is only required for those who have committed certain predicate crimes listed in Penal Code section 2962, subdivision (e)(2),[1] including crimes that involved "force or violence, or caused serious bodily injury" (subd. (e)(2)(P)) or an express or implied threat "of force or violence likely to produce substantial physical harm" (subd. (e)(2)(Q)).

After trial, a jury concluded that defendant Mark Steven Simmons "represents a substantial danger of physical harm to others" "by reason of" "a severe mental disorder," pedophilia, "that is not in remission or cannot be kept in remission without treatment."

[1] Further statutory references are to the Penal Code unless otherwise specified.

Based on these findings, the trial court ordered that defendant receive one year of continued treatment, until November 4, 2004, by the State Department of Mental Health. (§§ 2970, 2962.)

On appeal, defendant does not dispute the jury's findings. Instead he challenges the trial court's conclusion that his predicate crimes qualify him for continued treatment. Here we will conclude that the People failed to prove that defendant's lewd touchings of a 14-year-old female when he was 39 years old qualified as predicate offenses under any subparts of section 2962, subdivision (e)(2).

## PROCEEDINGS

On March 8, 1999, defendant waived a preliminary examination and pleaded no contest to two charges of committing lewd and lascivious acts upon a 14-year-old female when he was 39 years old. (§ 288, subd. (c)(1).)[2] On May 6, 1999, defendant was placed on probation with a number of conditions including no contact with the victim.

On November 18, 1999, probation was revoked based on allegations that defendant had contacted the victim twice. On December 10, 1999, after admitting a probation violation, defendant was committed to prison for two years, eight months. On November 2, 2000, defendant was transferred from Folsom State Prison to Atascadero State Hospital (ASH). On August 7, 2001, defendant was discharged from ASH to the conditional release program (CONREP) for outpatient treatment. However, on August 28, 2001, defendant was rehospitalized at Napa State Hospital for disobeying CONREP

---

[2] The People's brief asserts that the typical offense involved defendant joining the victim while she was watching television in her residence. Defendant reached under her shirt and felt her breasts. When she pushed him away, he said that it was "okay." At least twice he attempted to unbutton her pants and put his hand inside.

As we explain on page 10, *post*, we are unable to rely on these assertions, because the People, in seeking to prove that defendant's predicate crimes qualified for continued treatment, inexplicably failed to offer admissible evidence to the trial judge of the specifics of the crimes.

rules and expressing suicidal ideations. On September 11, 2001, defendant was transferred back to ASH.

On August 5, 2003, pursuant to a request by the ASH medical director, the Santa Clara County District Attorney filed a petition to compel defendant's continued involuntary treatment past his parole date of November 2, 2003.

**THE HEARING**

At the hearing on October 27, 2003, the parties agreed to submit to the trial court and not the jury the question whether defendant's prior crimes qualified for continued treatment under section 2962, subdivision (e). Dr. Stacy Thacker, a senior psychologist specialist at ASH, testified in the jury's absence. The court overruled defendant's in limine motion precluding the expert witness from relying on probation reports. At the conclusion of the court hearing, the court ruled that the probation reports themselves were inadmissible hearsay.

In Dr. Thacker's opinion, based on working with defendant at ASH, interviewing him, and reviewing probation reports, his crimes involved force. She acknowledged that some other ASH doctors believed force or violence is not a clinical determination. Dr. Thacker did not describe the specifics of the offenses resulting in defendant's no contest plea to two counts of lewd touching of a 14 year old. She did mention the dynamics between defendant and the victim. Defendant's approach was to ingratiate himself and appease the victim. He gave her gifts and things.

Dr. Thacker relied on the following statements by defendant as recorded in a probation report dated April 12, 1999. Defendant admitted to the arresting officers that "the victim was upset at what he was doing but . . . she did not fight him." The victim would push him away when he touched her and defendant would repeat "it's okay" "as a way of calming her or manipulating her." "'The defendant stated whenever the victim told him to stop, he would but she never fought him off.'" He left the room when she told him to, but he would return.

In Dr. Thacker's interview with defendant, defendant acknowledged that the victim had pushed him away. He stated that since the victim did not fight him, no force was involved.

Dr. Thacker's opinion relied on the victim's statement to the probation officer that she was unable to sleep at night because defendant had instilled fear in her. Dr. Thacker conceded that a molest victim could be scared and upset without force having been used. She acknowledged that defendant stopped when the victim told him to. He did not threaten or physically restrain her.

Dr. Thacker based her opinion on the above statements and also on her general knowledge of the nature of pedophilia and child molests. She explained: "The psychology with molest victims most don't fight and don't put up a struggle. Children in our society are taught to obey elders and to not object so it doesn't surprise me that there was no real physical rejection of it. But in a victim's mind, that force is there clearly by the power differential and the age differential involved in the relationship." "Fourteen year olds don't have the ability to protect themselves in the same way as an adult does."

**THE COURT'S DECISION**

After hearing this testimony, the trial court ruled orally in part as follows. "I am going to take judicial notice of the stipulation that Mr. Simmons has been convicted of a 288 (c)(1), two counts, and therefore I'm going to find that that offense is a predicate offense under Penal Code section 2962(Q). It's a crime I find in which the perpetrator expressly or impliedly which in this instance is applicable the words 'threatened another with the use of force or violence likely to produce substantial physical harm in such a manner that reasonable person would believe and expect that the force or violence would be used.' I'm going to find that to be the case because of the conclusion reached by the doctor, her expression of what impliedly threatened force is in a molest situation because of the age differential and because of the actions she perceived in the pushing away and

the returning of the respondent to the molest victim. So, therefore, I'm going to find that that is, in fact, a predicate offense under 2962(Q)."

After the court found that the crimes qualified as predicate offenses, the jury heard testimony from the same psychologist supporting the conclusions that defendant "represents a substantial danger of physical harm to others" "by reason of" "a severe mental disorder," pedophilia, "that is not in remission or cannot be kept in remission without treatment." Based on these findings, the trial court ordered that defendant receive one year of continued treatment until November 4, 2004.

### 1. CRIMES QUALIFYING FOR MDO TREATMENT

Since 1986, California statutes have provided that certain mentally disordered offenders may be subjected to continued involuntary treatment by the State Department of Mental Health beyond the time when the offender would otherwise be released from incarceration. Before a court may order continued treatment, a jury or court must find "that the patient has a severe mental disorder, that the patient's severe mental disorder is not in remission or cannot be kept in remission without treatment, and that by reason of his or her severe mental disorder, the patient represents a substantial danger of physical harm to others." (§ 2972, subd. (c).) Whether a person meets the statutory criteria is determined at a "civil hearing" at which the burden is on the prosecution to convince a unanimous jury beyond a reasonable doubt of the need for continued treatment. (§§ 2966, subd. (b), 2972, subd. (a).) Treatment is only appropriate if the prisoner's "severe mental disorder was one of the causes of or was an aggravating factor in the commission of a crime for which the prisoner was sentenced to prison." (§ 2962, subd. (b).)

Section 2962, subdivision (e)(2) lists a number of specific offenses qualifying for continued treatment.[3] It is a simple and "entirely legal" question whether defendant's crime appears on this statutory list. (*People v. Kelii* (1999) 21 Cal.4th 452, 456 [involving list of felonies qualifying as strikes].) The list includes "(I) Lewd acts on a

---

[3] "(A) Voluntary manslaughter.

"(B) Mayhem.

"(C) Kidnapping in violation of Section 207.

"(D) Any robbery wherein it was charged and proved that the defendant personally used a deadly or dangerous weapon, as provided in subdivision (b) of Section 12022, in the commission of that robbery.

"(E) Carjacking, as defined in subdivision (a) of Section 215, if it is charged and proved that the defendant personally used a deadly or dangerous weapon, as provided in subdivision (b) of Section 12022, in the commission of the carjacking.

"(F) Rape, as defined in paragraph (2) or (6) of subdivision (a) of Section 261 or paragraph (1) or (4) of subdivision (a) of Section 262.

"(G) Sodomy by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person.

"(H) Oral copulation by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person.

"(I) Lewd acts on a child under the age of 14 years in violation of Section 288.

"(J) Continuous sexual abuse in violation of Section 288.5.

"(K) The offense described in subdivision (a) of Section 289 where the act was accomplished against the victim's will by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person.

"(L) Arson in violation of subdivision (a) of Section 451, or arson in violation of any other provision of Section 451 or in violation of Section 455 where the act posed a substantial danger of physical harm to others.

"(M) Any felony in which the defendant used a firearm which use was charged and proved as provided in Section 12022.5, 12022.53, or 12022.55.

"(N) A violation of Section 12308.

"(O) Attempted murder."

child under the age of 14 years in violation of Section 288." (§ 2962, subd. (e)(2).) Though this subdivision refers to the crimes prohibited in subdivisions (a) and (b) of section 288,[4] this list does not include defendant's crime, which was lewd acts on a 14 year old in violation of section 288, subdivision (c).[5]

A crime may qualify for continued treatment without being specifically listed. Section 2962, subdivision (e)(2) contains two catchall categories. "(P) A crime not enumerated in subparagraphs (A) to (O), inclusive, in which the prisoner used force or violence, or caused serious bodily injury as defined in paragraph (4) of subdivision (f) of Section 243. [¶] (Q) A crime in which the perpetrator expressly or impliedly threatened another with the use of force or violence likely to produce substantial physical harm in such a manner that a reasonable person would believe and expect that the force or violence would be used. For purposes of this subparagraph, substantial physical harm shall not require proof that the threatened act was likely to cause great or serious bodily injury."

What is now section 2962, subdivision (e)(2)(P) was for many years the only statutory description of qualifying offenses (former § 2960, subd. (b)(5); Stats. 1985,

---

[4] Subdivision (a) prohibits simple lewd touching of a child under 14. "Any person who willfully and lewdly commits any lewd or lascivious act . . . upon or with the body, or any part or member thereof, of a child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child . . . ." Subdivision (b)(1) prohibits aggravated lewd touching of a child under 14. "Any person who commits an act described in subdivision (a) by use of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person . . . ."

[5] Section 288, subdivision (c)(1) prohibits lewd touching of a child 14 or 15 years old. "Any person who commits an act described in subdivision (a) with the intent described in that subdivision, and the victim is a child of 14 or 15 years, and that person is at least 10 years older than the child . . . ." There is no provision for an aggravated crime of lewdly touching a 14 or 15 year old comparable to section 288, subdivision (b)(1).

ch. 1419, § 1, p. 5013), until the list quoted above (*ante,* fn. 3) was enacted in substantially its current form in 1995. (Stats. 1995, ch. 761, § 1, pp. 5911-5912.) Subparagraph (Q) was added by urgency legislation effective April 22, 1999. (Stats. 1999, ch. 16, § 1, No. 2 West's Cal. Legis. Service, p. 65.) This amendment was a legislative reaction to the January 14, 1999, California Supreme Court decision of *People v. Anzalone* (1999) 19 Cal.4th 1074, 1083 (*Anzalone*), which construed "force" in section 2962, subdivision (e)(2)(P) as not including express or implied threats of force. (*People v. Macauley* (1999) 73 Cal.App.4th 704, 708; *People v. Butler* (1999) 74 Cal.App.4th 557, 561; *People v. Dyer* (2002) 95 Cal.App.4th 448, 454.)

**2. SUFFICIENCY OF THE EVIDENCE OF A QUALIFYING CRIME**

In this case the expert testified that defendant's crimes involved force. The trial court relied on the doctor's conclusion and determined that defendant's crimes qualified under section 2962, subdivision (e)(2)(Q) because they involved an express or implied threat of force.

On appeal defendant contends that there was insufficient evidence that his crimes involved either force or violence (§ 2962, subd. (e)(2)(P)) or an express or implied threat of force or violence likely to produce substantial physical harm (§ 2962, subd. (e)(2)(Q)). The People respond that "there is ample evidence to support the trial court's finding that [defendant] used the threat of force or violence to carry out his sexual molestations."

***A. Standard of review***

In the trial court, "[t]he question whether the acts occurred is certainly a factual matter for the [fact-finder], but the *characterization* of those acts as involving an express or implied use of force or violence, or the threat thereof, would be a legal matter properly decided by the court." (*People v. Nakahara* (2003) 30 Cal.4th 705, 720 [whether murder defendant was involved in the special circumstance of an "express or implied threat to use force or violence" under § 190.3, subd. (b)]; cf. *People v. Kelii*, *supra*, 21 Cal.4th at

pp. 456-457 [it is a "largely legal" question for the court, not the jury, whether a prior conviction qualifies as a serious felony].)

Appellate review of sufficiency of the evidence questions in MDO proceedings incorporates the criminal conviction standard of review. (*People v. Miller* (1994) 25 Cal.App.4th 913, 920 (*Miller*).) "'"On appeal, we must view the evidence in the light most favorable to the People and must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.] [¶] Although we must ensure the evidence is reasonable, credible, and of solid value, onetheless it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts on which that determination depends. [Citation.] Thus, if the verdict is supported by substantial evidence, we must accord due deference to the trier of fact and not substitute our evaluation of a witness's credibility for that of the fact finder. [Citations.]" [Citation.]' [Citation.]" (*Id.* at p. 919.) On appeal, whether the evidence is sufficient to establish a qualifying crime is ultimately a question of law. (Cf. *People v. Barragan* (2004) 32 Cal.4th 236, 246.)

***B. The evidence of defendant's crimes***

When the trial court determined that defendant's prior crimes qualified, the only evidence before the court was the testimony of Dr. Thacker. *Miller* concluded that, in an MDO hearing, "a qualified mental health professional may refer to and consider the underlying probation report in expressing an opinion that the prisoner is an MDO. This includes the criterion or element that the underlying offense is one involving 'force or violence.'" (*Miller, supra,* 25 Cal.App.4th at p. 917.) *Miller* also concluded that the probation report by itself was inadmissible because it contained multiple hearsay. (*Id.* at pp. 917, 919; *People v. Campos* (1995) 32 Cal.App.4th 304, 310.) The trial court in this case ruled consistently with *Miller*, excluding the probation reports while allowing Dr. Thacker to rely on them.

As noted, the People's brief seeks to provide us with various details of defendant's crimes. (*Ante,* fn. 2.) These details are based partly on a protective order filed in this case and partly on the probation report dated April 12, 1999. As defendant points out, these details were not before the court when it ruled, since the probation report itself was excluded as hearsay.

We find no provision in the MDO act similar to that in the sexually violent predators statute (Welf. & Inst. Code, § 6600, subd. (a)(3)) authorizing a court's reliance on probation reports for the details of the predicate offenses. In any event, the court here did not purport to rely on the probation reports themselves. As defendant urges, on appeal, in determining the sufficiency of the evidence, we are limited to the evidence before the judge at the time of his ruling. (*People v. Jackson* (1992) 7 Cal.App.4th 1367, 1372-1373; *Brodie v. Barnes* (1942) 56 Cal.App.2d 315, 320.) "We review the correctness of the trial court's ruling at the time it was made . . . and not by reference to evidence produced at a later date." (*People v. Welch* (1999) 20 Cal.4th 701, 739.)

Accordingly, our review is limited to the details that Dr. Thacker provided at the court trial, based on her interview with defendant and her review of the probation report. Dr. Thacker described the crimes as follows. Defendant touched the victim. She pushed him away. When she told him to stop, he stopped. She never fought him off. He did not threaten or forcibly restrain her. When she told him to leave the room he did, though he would return. He told her it was okay when he touched her. He was aware she was upset with him. Dr. Thacker also mentioned "the power differential and the age differential involved in the relationship." She did not expressly mention a size differential. At the hearing before the judge there was no testimony by Dr. Thacker and no other evidence admitted describing the specifics of defendant's crimes.

***C. Evidence of an express or implied threat of force or violence***

The trial court cited the age differential and defendant's persistence when the victim pushed him away in concluding that the crimes involved an express or implied

threat of force or violence likely to product substantial physical harm under section 2962, subdivision (e)(2)(Q).

The only threat cases we have found arising under section 2962, subdivision (e)(2)(Q) involved express threats. Following enactment of subparagraph (Q) in 1999, *People v. Lopez* (1999) 74 Cal.App.4th 675 found sufficient evidence that a defendant's criminal threats "expressly threatened [his girlfriend] with an immediate threat of force or violence likely to produce substantial risk of harm." (*Id.* at p. 680.) He told her that he wanted to get a gun to shoot her. (*Ibid.*) "He also threatened to solicit friends to kill her." (*Id.* at p. 679.) *People v. Butler*, *supra*, 74 Cal.App.4th 557 concluded that a defendant's stalking "meets the criteria of section 2962, subdivision (e)(2)(Q). He followed his victim and threatened to kill her and members of her immediately family. These threats were made in 'such a manner that a reasonable person would believe and expect that the force or violence would be used.' (§ 2962, subd. (e)(2)(Q), [citation].)" (*Id.* at pp. 561-562.) Defendant contrasts this case, which, as Dr. Thacker acknowledged, involved no express threat.

The existence of an implied threat of force is important in other legal contexts. "The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence" is a factor justifying imposition of the death penalty. (§ 190.3, subd. (b).) Also, it amounts to aggravated dissuasion of a witness "[w]here the act is accompanied by force or by an express or implied threat of force or violence." (§ 136.1, subd. (c)(1).)

In a case arising under section 190.3, *People v. Raley* (1992) 2 Cal.4th 870 found sufficient evidence of "an implied threat of force" in a lewd touching incident when a 17-year-old male told a six-year-old female that " 'bad things' " would happen to her unless she accompanied him into a house. (*Id.* at p. 907.)

We note that an implied threat of force or violence is part of the definition of "duress" for related sex crimes. *People v. Pitmon* (1985) 170 Cal.App.3d 38 held that,

for purposes of aggravated lewd touching, the statutory element of "duress" (see § 288, subd. (b)(1), quoted, *ante,* fn. 4) means "a direct or implied threat of force, violence, danger, hardship or retribution sufficient to coerce a reasonable person of ordinary susceptibilities to (1) perform an act which otherwise would not have been performed or, (2) acquiesce in an act to which one otherwise would not have submitted. [¶] The total circumstances, including the age of the victim, and his relationship to defendant are factors to be considered in appraising the existence of duress." (*Id.* at pp. 50-51, fn. omitted.)[6]

We recognize there is an incomplete congruity between *Pitmon*'s definition of "duress" and section 2962, subdivision (e)(2)(Q). This "duress" is broader than the reach of subdivision (e)(2)(Q). Subdivision (e)(2)(Q) is limited to express or implied threats of "force or violence likely to produce substantial physical harm." In contrast, duress in the forcible lewd touching context can involve threats of retribution not involving physical harm. (E.g., *People v. Cochran* (2002) 103 Cal.App.4th 8, 15-16 [implicit threat that father would break up family if daughter did not comply].) At best, lewd touching cases finding substantial evidence of duress are of limited guidance in applying subdivision (e)(2)(Q) because (Q) only involves threats of "force or violence likely to produce substantial physical harm." (Compare *People v. Schulz* (1992) 2 Cal.App.4th 999, 1004-1005 [lewd touching involved duress when molester, the victim's uncle, employed psychological and physical dominance by cornering her in a room and grabbing and

---

[6] "Duress" and this definition were later incorporated into the rape statute (§ 261, subd. (b)), after *People v. Bergschneider* (1989) 211 Cal.App.3d 144 observed, "For reasons which escape us, rape is the only major sexual assault crime which cannot be committed by means of duress. (See § 261(2); compare §§ 286(c), 288(b), 288a(c), and 289(a).)" (*Id.* at p. 152, fn. omitted.) This definition was later modified in section 261, but the modification does not affect the definition of "duress" in other statutes. (*People v. Leal* (August 5, 2004, S114399) __ Cal.4th ___ [2004 WL 1746324].)

holding her while she screamed and cried] and *People v. Senior* (1992) 3 Cal.App.4th 765, 775 [lewd touching involved duress when molester who had previously hit the victim, his daughter, had threatened to hurt her if she resisted his advances or told anyone and he physically controlled her during the molests] with *People v. Espinoza* (2002) 95 Cal.App.4th 1287, 1321 [paternal status and size difference were not enough to establish that lewd touching involved duress].)

In this case, while the trial court found an implied threat of force based on the doctor's conclusion, the doctor did not conclude there was an implied threat of substantial physical harm. There was no evidence that the victim said that she feared physical harm. We see nothing in the age or power differences between defendant and his victim that inherently threatened the victim with substantial physical harm. Defendant's persistence, without more, does not amount to an implied threat of physical harm.

"Expert opinion testimony constitutes substantial evidence only if based on conclusions or assumptions supported by evidence in the record. Opinion testimony which is conjectural or speculative 'cannot rise to the dignity of substantial evidence.'" (*Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 634, 651.)

We conclude that the expert's opinion that force was involved does not amount to substantial evidence that there was an express or implied threat of "the use of force or violence likely to produce substantial physical harm." (§ 2962, subd. (e)(2)(Q).)

***4. Evidence of force***

While the trial judge expressly found an implied threat of force and invoked section 2962, subdivision (e)(2)(Q), we note that the judge also relied on the doctor's conclusion. (*People v. Butcher* (1986) 185 Cal.App.3d 929, 936-937.) The doctor concluded that there was "force." Accordingly, we also consider whether there was sufficient evidence of "force" within the meaning of section 2962, subdivision (e)(2)(P). As this court stated in *People v. Vargas* (2001) 91 Cal.App.4th 506, "[W]here the [trier of fact] is presented with several factual theories for conviction, some of which are

predicated upon insufficient evidence, 'the appellate court should affirm the judgment unless a review of the entire record affirmatively demonstrates a reasonable probability that the [trier of fact] in fact found the defendant guilty solely on the unsupported theory.' (*People v. Guiton* (1993) 4 Cal.4th 1116, 1130.)" (*Id.* at p. 564.)

As indicated above, the California Supreme Court has construed "force" within the meaning of section 2962, subdivision (e)(2)(P) in *Anzalone*, *supra*, 19 Cal.4th 1074. *Anzalone* disapproved of a liberal construction of "force" in *People v. Pretzer* (1992) 9 Cal.App.4th 1078 (*Pretzer*). Noting that "[t]he primary purpose of section 2962 is to protect the public safety" (*id.* at p. 1082), *Pretzer* had stated, "We believe the Legislature meant 'force' to have a broad meaning." (*Id.* at p. 1083.) *Pretzer* concluded that "force" included conduct that implied that force may be used. (*Id.* at pp. 1082-1083.) As in robbery, "force" was not limited to the application of power. "The test is whether '"resistance is involuntarily overcome."'" (*Id.* at p. 1083.)

*Anzalone* observed, "If the Legislature had intended that an implied threat of force was sufficient to sustain an MDO commitment, it readily could have so provided, as it did in several other Penal Code sections." (*Anzalone*, *supra*, 19 Cal.4th at p. 1080.) *Pretzer's* interpretation essentially added "or fear" to "force." (*Id.* at p. 1081.) It would make every robbery a qualifying offense, when section 2962, subdivision (e)(2)(D) only describes certain types of robberies. (*Id.* at pp. 1081-1082.) The court cited *People v. Collins* (1992) 10 Cal.App.4th 690 with approval, noting "that the Legislature intended the MDO Act to apply only to violent offenders or persons convicted of violent offenses." (*Anzalone, supra,* 19 Cal.4th at p. 1082.) "'[F]orce' and 'violence' are words of ordinary meaning requiring no further definition." (*Ibid.*) A slight touching does not qualify as force. (*Ibid.*)

As noted above, the Legislature promptly reacted to *Anzalone* by enacting section 2962, subdivision (e)(2)(Q), adding an express or implied threat of force to the statute.

We do not understand this response to cast doubt on *Anzalone*'s interpretation of "force" in section 2962, subdivision (e)(2)(P).

Perhaps because the underlying crime in *Anzalone* was an "unarmed second degree robbery" (*Anzalone, supra,* 19 Cal.App.4th at p. 1076), the Supreme Court did not mention the established definition of "force" in sex crimes. Most every statute prohibiting sex crimes includes the phrase "force, violence, duress, menace, or fear of immediate and unlawful bodily injury." (E.g., §§ 261, subd. (a)(1) [rape]; 269, subd. (a)(3) & (4) [aggravated sexual assault on a child]; 286, subd. (c)(2) [aggravated sodomy]; 288, subd. (b)(1) & (2) [aggravated lewd touching]; 288a, subd. (c)(2) [aggravated oral copulation]; 289, subd. (a)(1) [forcible sexual penetration].) Case law has established that "force" in most of these statutes means "physical force substantially different from or substantially greater than that necessary to accomplish the" underlying crime lewd act itself. (*People v. Cicero* (1984) 157 Cal.App.3d 465, 474; *People v. Pitmon*, *supra*, 170 Cal.App.3d at p. 52.) This court has adopted this explanation of "force" in lewd touching cases. (*People v. Bolander* (1994) 23 Cal.App.4th 155, 158-159; *People v. Gilbert* (1992) 5 Cal.App.4th 1372, 1381; *People v. Senior*, *supra*, 3 Cal.App.4th at p. 774; *People v. Schulz*, *supra*, 2 Cal.App.4th at p. 1004; *People v. Quinones* (1988) 202 Cal.App.3d 1154, 1158; but see Mihara, J. concurring in *Bolander*, *supra*, 23 Cal.App.4th at p. 164.) The California Supreme Court has recently concluded that "force" does not have the same meaning in the forcible rape context under section 261, subdivision (a)(2). (*People v. Griffin* (August 9, 2004, S109734) __ Cal.4th ___ [2004 WL 1769103].) We mention these cases without intending to imply that "force" in section 2962, subdivision (e)(2)(P) has the identical meaning it has in these other statutes.

*Anzalone* also did not mention the "force" cases qualifying a defendant for the death penalty under section 190.3. *People v. Raley*, *supra*, 2 Cal.4th 870 explained "For the purpose of admissibility under section 190.3, factor (b): ' "[T]he 'force' requisite . . . does not mean bodily harm but the physical power required in the circumstances to

overcome [the victim's] resistance."' (*People v. Jennings* (1988) 46 Cal.3d 963, 983.)[7] We have recognized inequality in size between the perpetrator and victim as an element of such physical power. (*Id.* at pp. 982-983.)" (*Id.* at p. 997.)

*People v. Jennings*, *supra*, 46 Cal.3d 963 found that a rape had involved a threat of force under section 190.3 when the defendant threatened to hurt or kill the victim, his 13-year-old sister-in-law, if she moved. (*Id.* at p. 983.) The court also found sufficient evidence of force when the defendant, who was six feet tall and weighed 170 pounds, lay down on the couch next to the victim, who was five feet two inches tall and weighed 100 pounds, "placed her on her back, and then lay on top of her to accomplish the act." (*Ibid.*)

Following *Anzalone*'s construction of "force" in section 2962, subdivision (e)(2)(P), *People v. Clark* (2000) 82 Cal.App.4th 1072 concluded that there was substantial evidence that a grand theft involved force when the "defendant grabbed the money from the victim's hand, broke away from his grasp in the cab in order to escape, and struggled or fought with him to retain the stolen money." (*People v. Clark, supra,* 82 Cal.App.4th at p. 1084.) *People v. Valdez* (2001) 89 Cal.App.4th 1013 concluded that a sexual battery involved force when the defendant "physically restrained a small child too young to resist and touched her vaginal area for several minutes despite the presence of other family members." (*Id.* at p. 1017.)

Defendant contrasts this case, which, as Dr. Thacker acknowledged, involved no physical restraint of the victim. Due to the limited factual presentation to the trial court, there is little evidence regarding the nature of the physical contact between defendant and his victim. If there was evidence of a struggle or physical restraint, it was not presented

---

[7] This definition of force was taken from rape cases, with *Jennings* quoting *People v. Peckham* (1965) 232 Cal.App.2d 163, 168.

to the trial court. Dr. Thacker did not testify that defendant applied any physical force to his victim. Her testimony was instead that, "in a victim's mind, that force is there clearly by the power differential and the age differential involved in the relationship." In other words, Dr. Thacker considered the lewd touchings to have involved psychological force or compulsion.

This kind of psychological pressure or dominance, as indicated above, is what is typically characterized as "duress" in cases involving sex crimes. We have found no case that equates "force" in sex crime cases with "duress" or "menace." Presumably the Legislature has used each of these terms in most sex crime statutes because they have different meanings. (*People v. Caudillo* (1978) 21 Cal.3d 562, 582-584 (overruled on other grounds by *People v. Escobar* (1992) 3 Cal.4th 740, 749-751, and *People v. Martinez* (1999) 20 Cal.4th 225, 237, fn. 6).) For reasons unknown to us the Legislature has not added "duress" or "menace" to section 2962, subdivision (e)(2). Perhaps the omission was intentional, because the MDO statute is aimed at violent offenders. Perhaps the omission was unintentional, in which case the Legislature may wish to amend the language to conform to the language of most sex crime statutes.

An appellate court's role in statutory construction is a conservative one. Our function in construing section 2962, subdivision (e)(2)(P) is simply "to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted." (Code Civ. Proc., § 1858.) We are unable to conclude that "force" in section 2962, subdivision (e)(2)(P) describes the kind of psychological pressure in evidence here. (Accord *In re Jose M.* (1994) 21 Cal.App.4th 1470, 1477 ["rape in concert requires a rape 'by force or violence,' the alternative means of duress, menace or fear allowed for ordinary rape (§ 261, subd. (a)(2)) being unavailable." (Fn. omitted.)].) In our case it may be said that defendant overcame the victim's resistance, but there was no evidence he did so by applying physical force to the victim, let alone force substantially different from or greater than that necessary to accomplish the lewd act itself. Of course, we

cannot know, because the People failed to submit admissible evidence of the specifics of defendant's crimes. Accordingly we conclude that there was no substantial evidence that defendant's crimes involved "force" within the meaning of section 2962, subdivision (e)(2)(P).

### 3. FURTHER PROCEEDINGS

The trial court conducted a bifurcated hearing on whether defendant's predicate offenses qualified him under section 2962, subdivision (e)(2)(P) or (Q) for continued treatment. We have concluded only that the prosecutor presented insufficient evidence to support a finding that defendant's prior crimes involved either force (P) or an express or implied threat of force likely to produce substantial physical harm (Q). We have not concluded that it is impossible to prove defendant's crimes qualified under either subdivision.

Because this was a civil hearing, double jeopardy does not bar relitigation of this issue, although res judicata and collateral estoppel apply. (*People v. Francis* (2002) 98 Cal.App.4th 873, 876; *People v. Parham* (2003) 111 Cal.App.4th 1178, 1181.) Our conclusion about the insufficiency of the evidence does not preclude the prosecutor from offering additional evidence if the prosecutor elects to retry this issue. (Cf. *People v. Barragan, supra,* 32 Cal.4th 236 [providing for retrial of prior conviction enhancements].) If there is such a retrial, defendant is released from his stipulation that this issue was for the judge to determine. Since defendant has not challenged the jury's findings, any retrial will be limited to the issue whether defendant's crimes qualify him for treatment. If there is another finding that defendant's crimes qualify him for treatment, this finding will only justify his continued treatment until November 4, 2004, the time of the original commitment.[8]

[8] We note that the statute does not provide for the immediate release of a person who does not qualify for continued treatment. Section 2974 states, "Before releasing any (Continued)

## DISPOSITION

The order committing defendant for continued treatment is reversed for further proceedings as described in the preceding section.

Walsh, J.*

WE CONCUR:

Rushing, P.J.

Premo, J.

---

inmate or terminating supervision of any parolee who is a danger to self or others, or gravely disabled as a result of mental disorder and who does not come within the provisions of Section 2962, the Director of Corrections may, upon probable cause, place, or cause to be placed, the person in a state hospital pursuant to the Lanterman-Petris-Short Act . . . ."

We recognize that there may be a pending petition for recommitment, since defendant's current commitment lasts only until November 4, 2004. (§ 2972, subd. (e).) Alternatively, defendant may have already been released from treatment if the Director of Mental Health has determined, during the pendency of this appeal, that defendant's "severe mental disorder is put into remission." (§ 2968.)

*Judge of the Santa Clara County Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.